(54)

No. 04-108

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF PETITIONERS

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QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Susette Kelo; Thelma Brelesky; Pasquale Cristofaro; Wilhelmina and Charles Dery; James and Laura Guretsky; Pataya Construction Limited Partnership; and William Von Winkle.[1]

Respondents, who were defendants below, are the City of New London, Connecticut; and the New London Development Corporation.

[1] None of the Petitioners are corporations, and have no parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Pet. App. 1-190)[1] is reported at 843 A.2d 500 (Conn. 2004). The opinion of the Superior Court of Connecticut, Judicial District of New London (Pet. App. 191-424), is unreported.

JURISDICTION

The opinion and judgment of the Supreme Court of Connecticut was entered on March 9, 2004. The motion for reconsideration filed by Petitioners was denied on April 20, 2004. Pet. App. 427. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the public use provision of the Takings Clause of the Fifth Amendment to the United States Constitution. Pet. App. 428. The statute involved is Chapter 132, C.G.S. § 8-186, *et seq.*, Municipal Development Projects, of Connecticut General Statutes. Pet. App. 429-453.

STATEMENT OF THE CASE

A. Facts

Petitioner Wilhelmina Dery was born in her house in the Fort Trumbull neighborhood of New London, Connecticut in 1918.[2] Her family, the Ciavaglias, first moved to

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[1] References to the Appendix to the Petition for a Writ of Certiorari are noted as "Pet. App." References to the Joint Appendix are noted as "J.A."

[2] The information concerning Petitioner Wilhelmina Dery and her family is drawn from the trial transcript in this matter, Vol. I.,

(Continued on following page)

Fort Trumbull from Italy in the early 1880s. Mrs. Dery still lives in her home on Walbach Street, which was purchased by her family in 1901, as she has for her entire life. Her husband, Charles, lives there as well, and moved into the house when the couple married fifty-nine years ago.

The Derys' son, Matthew, was born in Fort Trumbull and grew up there. He, his wife, and his son currently live right next door to Mr. and Mrs. Dery at 28 East Street in a home he received from his grandmother as a wedding present. The home has been in his family since 1903. Petitioner Susette Kelo, a registered nurse, lives down the block from the Derys at 8 East Street. Tr. Vol. I, p. 71, lns.1-10. She purchased the Victorian-era house in 1997 and since that time has made extensive improvements to it. *Id.* at pp. 71-72. She loves the water view from her home, the people in the area, and the fact that she can get in a boat and be out in the Long Island Sound in less than ten minutes. *Id.* at pp. 76, lns. 1-11.

Wilhelmina Dery, Susette Kelo, and their neighbors, the other Petitioners in this case, stand to lose their homes through eminent domain to make way for private business development in the hope that the new development projects will create more tax revenue and jobs than the homes that currently occupy this peninsula of land along the Thames River. Petitioners have poured their labor and love into the fifteen homes they own in total. Pet. App. 8-9. They are places where they have lived for years, have raised their families, and have grown old. Petitioners do not want money or damages. They only seek to stop the

pp. 40-53. (All future references to the trial transcript will be referred to as "Tr." followed by the volume, page number, and, where appropriate, the line numbers.)

use of eminent domain so that they may hold on to their most sacred and important of possessions: their homes.

In February 1998, Pfizer, Inc. announced that it was developing a global research facility on a site adjacent to the Fort Trumbull neighborhood where Petitioners live. Pet. App. 4. In April 1998, the city council of Respondent City of New London ("the City") gave initial approval to Respondent New London Development Corporation ("NLDC") to prepare a development plan for the Fort Trumbull area. *Id.* The NLDC is a private, non-profit corporation formed in 1978 to assist the City in planning economic development. Pet. App. 3-4, 211. Like any such entity, it is not elected by popular vote and has a privately-appointed Board of Directors and employees. Pet. App. 211.

The NLDC prepared the Fort Trumbull Municipal Development Plan ("development plan") that sought to create economic development complementing the facility that Pfizer was planning to build. Pet. App. 5. On January 18, 2000, the City adopted the development plan as prepared by the NLDC. Pet. App. 8. The development plan covers approximately 90 acres located on the Thames River and adjacent to both the Pfizer facility and the Fort Trumbull state park. Pet. App. 4. The development plan area is comprised of approximately 115 land parcels and includes the presently closed U.S. Naval Undersea Warfare Center, which consists of 32 acres currently available to Respondents for development. *Id.*

The 90-acre development plan is divided into seven "parcels" of land slated for different development projects. Pet. App. 5-6. Parcel 1 is slated for a waterfront hotel and conference center along with marinas and a public walkway along the water. Pet. App. 5; J.A. 109. Parcel 2 is to provide approximately 80 new residences and possibly a museum for the U.S. Coast Guard. Pet. App. 5; J.A. 109-110. The

development plan calls for Parcel 3 to contain 90,000 square feet of high technology and other private office space and parking.[3] Pet. App. 5-6; J.A. 110-11. Although originally slated for acquisition and demolition under the plan, Parcel 3 will retain the existing Italian Dramatic Club, a private social organization with its own building. Pet. App. 6.

Parcel 4 is subdivided into two smaller parcels, 4A and 4B. J.A. 111-12. Parcel 4A is designated as "Park Support." Pet. App. 6; J.A. 112. The development plan envisions several possible future uses for 4A, including a "state-of-the-art marina training center," which presumably would encompass both Parcel 4B and 4A, undefined "uses that support the state park," and parking or retail establishments. *Id.* During trial, no witness could explain what "Park Support" meant and all witnesses admitted that it could be a wide range of possible but undefined uses. Pet. App. 346 (summarizing trial testimony).[4] Parcel 4B is supposed to consist of a marina, the same as the current use for the parcel. Pet. App. 6; J.A. 111. Parcel 5 is also subdivided into three smaller parcels that will cumulatively include 140,000 square feet of office space. Pet. App. 6; J.A. 112. Parcel 6 is designated for development of a variety of water-dependent commercial uses while Parcel 7 is slated for additional office space or research and development use. Pet. App. 6; J.A. 112-13.

In discussions as to what would constitute the future uses in the development plan, Pfizer was the "10,000

[3] The parcel was also originally slated for a health club, but that use has been moved to Parcel 1.

[4] *See also* Tr. Vol. II, p. 185, lns. 1-4, p. 207, lns. 15-18 (testimony of NLDC real estate development director); Vol. II, p. 236, lns. 12-20 (testimony of NLDC president); Vol. II, p. 37, lns. 16-24 (testimony of Petitioners' expert); Vol. II, p. 371, lns. 17-18 ("We didn't have configuration of what would be there") (testimony of Respondents' expert).

pound gorilla," according to Respondents' expert. Tr. Vol. II, p. 428, lns. 1-3. Indeed, the development plan contains all of Pfizer's "requirements" that it set forth in agreeing to build its global research facility in New London: a luxury hotel for its clients, upscale housing for its employees, and office space for its contractors (in existing buildings if no new ones are constructed) as well as the overall "redevelopment" of the Fort Trumbull neighborhood adjacent to Pfizer, in addition to other upgrades to the area that it demanded: renovation of the state park and sewage treatment plant upgrades.[5] The NDLC estimates that the development plan, which is a composite of six alternative development plans it considered, will produce a significant economic impact in a city that is struggling economically, including the creation of jobs and between $680,544 and $1,249,843 in property tax revenue. Pet. App. 7.

The instant case concerns homes located on only two parcels of the plan area: four properties owned by three Petitioners are situated on Parcel 3, which, as noted, is currently slated for development as private office space and parking, while eleven homes owned by four Petitioners are situated on Parcel 4A, designated in the development plan as the undefined "Park Support." Pet. App. 6; J.A. 3 (map showing Petitioners' homes); J.A. 4 (map showing development parcels in the development plan). In

[5] *Compare* J.A. 18 (listing commitments of NLDC to Pfizer); J.A. 21-25 (listing Pfizer requirements); Tr. Vol. II, p. 363, lns. 9-15; p. 387, lns. 6-17 (hotel); p. 163, lns. 19-21; p. 386, ln. 23 – p. 387 (conference center); Vol. II, p. 387, ln. 26 – p. 388, ln. 7 (upscale housing); Vol. II, p. 386, lns. 17-20 (office space); Vol. V(A), p. 71, lns. 19-24, p. 93, lns. 7-16, Vol. II, p. 104, lns. 22-27 (state park renovation); Vol. V(A), p. 70, lns. 26 – p. 71 lns. 1-3; Vol. II, p. 79, lns. 14-18 (sewage treatment upgrades) *with* J.A. 4 (showing planned uses in the development plan).

total, Petitioners' homes constitute 1.54 acres of the ninety-acre project area. Tr. Vol. II, p. 14, lns. 21-24, p. 37, lns 10-12. The remainder of the development parcels, including the entirety of Parcels 1, 2, 4B, 5, 6, and 7, are unaffected by the instant lawsuit and remain available to Respondents for new development projects. J.A. 4.

The NLDC will own the land located in the development area but lease it to private developers for $1 per year. Pet. App. 6, 7. At the time of the trial, the NLDC was negotiating with Corcoran Jennison, a private developer, to enter into a 99 year lease for development projects in parcels 1, 2, and 3 of the area although a development agreement had not been signed. *Id.* at 6-7. Corcoran Jennison would then develop the land and select tenants for the projects in its sole discretion. *Id.* However, the developer's own market study found new office construction on Parcel 3 to be "uncertain" (J.A. 47) and "not feasible at this time." J.A. 64. The study concluded that "market conditions do not justify construction of new commercial space at Fort Trumbull on a speculative basis." J.A. 64. At the time of the trial, there were no current plans for what projects would go in Parcel 4A apart from clearing the land of Petitioners' homes. Pet. App. 125 (majority opinion), 348 (trial court opinion).

When it adopted the development plan in January 2000, the City delegated to the NLDC the power of eminent domain to acquire properties within the development plan. Pet. App. 8. In October 2000, the NLDC voted to use eminent domain to acquire the remaining properties in the area from owners who would not sell voluntarily, including the homes owned by Petitioners. Pet. App. 8; J.A. 9-12 (resolution authorizing condemnations). Starting in November 2000, the NLDC began to file condemnation actions against Petitioners that gave rise to the present case. Pet. App. 8; J.A. 6-8 (representative statement of compensation accompanying condemnation action). The

NLDC brought all condemnation actions in this case not under Connecticut's urban renewal law (C.G.S. Chapter 130), which permits the use of eminent domain to clear slums or blighted areas, but rather under C.G.S. Chapter 132 governing Municipal Development Projects. Pet. App. 25-26, 246-247; J.A. 6 (property condemned pursuant to Chapter 132).

B. Procedural History

Under Connecticut law, property owners in the context of an eminent domain action can challenge only the amount of compensation offered, not the right of the government to take their property. So, wishing to keep their homes, Petitioners brought the instant action on December 20, 2000 seeking declaratory and injunctive relief, and other relief under C.G.S. Chapter 916 and 42 U.S.C. § 1983. Pet. App. 8. Petitioners alleged that Respondents' exercise of eminent domain violated the U.S. and Connecticut Constitutions, C.G.S. Chapter 132, and the New London City Charter.

Following a seven-day bench trial in 2001, the New London Superior Court issued a Memorandum of Decision (Pet. App. 191-424), which granted permanent injunctive relief and dismissed the eminent domain actions against the four Petitioners who live on Parcel 4A while upholding the takings of the properties of the three Petitioners on Parcel 3. Pet. App. 9, 424. With regard to Parcel 4A, the trial court ruled that Respondents had not demonstrated reasonable necessity for the condemnations and that the condemnations lacked assurances of future public use, because the Respondents had not identified the future use. Pet. App. 343-350. The trial court ruled in favor of the Respondents on the remaining claims. Although the trial court ruled against the Parcel 3 property owners, it granted a temporary injunction, allowing the owners to

remain in their homes while the case was resolved in the appellate courts. Pet. App. 412-424.

An appeal by Petitioners and a cross-appeal by Respondents to the Connecticut Appellate Court followed. The Connecticut Supreme Court transferred the appeal and cross-appeal to itself pursuant to C.G.S. § 51-199. Pet. App. 2 n.3. On March 9, 2004, a four-justice majority of the Court affirmed in part and reversed in part, holding that none of the challenged condemnations violated the U.S. or Connecticut Constitutions or C.G.S. Chapter 132. Pet. App. 3. Three of the justices concurred in part with the majority on other constitutional and statutory issues but dissented on the "majority's conclusions . . . pertaining to private economic development as a public use under the Connecticut and federal constitutions and the taking of [Petitioners'] properties on parcels 3 and 4A." Pet. App. 135-36.

The majority opinion in this case held that the public use clause of the Fifth Amendment to the U.S. Constitution authorizes the use of eminent domain for economic development that is prognosticated to increase future tax revenue and improve the local economy. Pet. App. 25-79. The standard adopted by the majority focused on the intent and motives of the government in determining whether the government satisfied the public use requirement. Pet. App. 28, 39, 42. As the dissenting justices noted, "[t]he majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough." Pet. App. 189.

In contrast, the dissenting opinion, while agreeing that economic development was validly declared a public purpose under Connecticut law, went on to establish a test that evaluated whether the primary intent of the economic development plan was to benefit public interests; whether a specific economic development will, in fact, result in public benefit; and whether the condemnation is reasonably necessary to implement the plan. Pet. App. 134-190. The dissenting justices found that the condemnations of all of Petitioners' homes failed that test.

The Connecticut Supreme Court denied Petitioners' motion for rehearing on April 20, 2004. Pet. App. 427. On the same day, the Court stayed its judgment pending resolution of a petition for certiorari to this Court or, if applicable, a decision on the merits. Pet. App. 425-426.

The homeowners filed a Petition for a Writ of Certiorari with this Court on July 19, 2004. Petitioners did not seek review by this Court of the other issues decided by the Connecticut Supreme Court but rather petitioned for review of the primary issue in this case: the limits under the public use requirement of the U.S. Constitution when government takes land for private economic development. On September 28, 2004, this Court granted certiorari on the question presented.

SUMMARY OF ARGUMENT

To Petitioners, like most Americans, their homes are their castles. In this case, they face the loss of the homes and neighbors they cherish through the use of eminent domain not for a traditional public use, such as a road or public building, nor even for the removal of blight. Rather, Respondents – a local government and a private development corporation – seek to take Petitioners' 15 homes to turn them over to other private parties in the hope that the City may benefit from whatever trickle-down effects those new businesses produce.

This Court should reject the use of eminent domain purely for private business development because that is not a public use under the Fifth Amendment to the U.S.

Constitution. The majority opinion below incorrectly equated "public use" with the ordinary "public" benefits – taxes and jobs – that typically flow from private business enterprises. But if nothing more is required to constitute a public use than listing expected tax revenue and job growth that might result from private development, then there is scarcely any private use or business for which the power of eminent domain could not be used. No court would then be able to distinguish between public uses and private ones. Such a result would violate this Court's consistent holdings that eminent domain authority cannot be employed for private uses. A finding that economic development is a public use would also be contrary to this Court's previous decisions that authorize the transfer of condemned land to private parties in only limited and specific circumstances, none of which apply to economic development condemnations.

Petitioners advocate a bright-line rule that the possible increase in taxes and jobs does not qualify as a public use. If, however, this Court finds that economic development can qualify as a public use, it still should reject these condemnations. Respondents seek to take Petitioners' homes for an office building that will not be built in the foreseeable future, if ever, and for some other, unidentified use. With no reasonably foreseeable use and no standards to ensure that "economic development" will ever result from these condemnations, Respondents seek to remove Petitioners from their homes on the assumption that someone will figure out what to do with the property later. Economic development condemnations bring enormous social costs and significant constitutional risk. At the very least, there must be a reasonable certainty of realization of the "public" benefits used to justify the takings in the first place. Here, there is no such reasonable certainty. The taking of Petitioners' homes is not for public use.

This case is not about whether economic development is a valid public policy goal. Instead, it is about whether the government and private corporations can forcibly acquire property for the sole reason that someone else may be able to put the land to more "productive" use that will produce more tax revenue and jobs. Government may pursue tax revenue and economic development, and corporations may pursue profits, but not at the expense of constitutional rights.

ARGUMENT

I. THE CONDEMNATION OF PETITIONERS' HOMES FOR THE SOLE PURPOSE OF ECONOMIC DEVELOPMENT VIOLATES THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT.

The Connecticut Supreme Court held that the use of eminent domain in the hope that private development may generate taxes and jobs and improve the local economy did not violate the public use requirement of the Fifth Amendment. But this Court has never gone so far. Thus, this case presents an issue of first impression. The Court should take this opportunity to reject the use of eminent domain purely for private business development because that is not a public use.

The use of eminent domain for private development conflates the public use clause of the Fifth Amendment with any private taking that could be claimed to benefit the public. Moreover, while the majority of the Connecticut Supreme Court portrays the condemnations at issue here as merely an application of this Court's prior eminent domain decisions, the use of eminent domain for private development represents a dramatic departure from this Court's jurisprudence.

A. The Use Of Eminent Domain For Private Economic Development Obliterates The Line Between Public And Private Takings.

While substantial deference must be given to legislative determinations of public use, this Court has consistently held that private takings cannot withstand the scrutiny of the public use requirement.[6] Accordingly, the definition of public use must allow for the identification of private uses. As set forth below, in upholding eminent domain for private economic development, the majority of the Connecticut Supreme Court effectively nullified the public use clause by making it virtually impossible to distinguish a public use from private takings. Additionally, the unfettered sweep of the majority's opinion places all home and small business owners at risk, especially property owners of more modest means.

In addition to making a profit for themselves and their shareholders, businesses, if they are successful, generate tax revenue, employ individuals, and contribute to the overall economic vitality of a community. Indeed, the incidental benefits that flow to the government and the community from private businesses are commonly recognized as virtues of a free enterprise system. Under the standard adopted by the majority below, however, private business development is transformed into a public

[6] *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid"); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 417 (1896) ("[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another" violates the Constitution).

use simply because of the "secondary"[7] or "trickle-down"[8] benefits a business may produce.[9]

The majority opinion below declared that even though these incidental benefits of business development can now be considered a public use under the Fifth Amendment, "unreasonable" uses of the condemnation power for private business development would still not be permitted. Pet. App. 71. Despite this assurance, the only ground the court suggested could be sufficient to strike down the taking of homes or small businesses for the purported public benefits claimed by a city government and private developers was if "the taking specifically is intended to benefit a private party." *Id.* The standard for public use adopted by the majority opinion focuses on the intent and motive of the government decision-makers in determining whether the condemnations are for a "public use." Pet. App. 42 (placing "overwhelming emphasis on the legislative purpose and motive behind the taking"). According to the majority opinion, so long as the City declares in good faith that there are economic benefits to be realized from condemnations and there is no overwhelming evidence that the takings were intended only to benefit a private party, any lower-tax generating use, such as a home or small business, could be taken and given to a larger

[7] *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 464-65 & n.19 (7th Cir. 2002) ("secondary benefits" from business development cannot alone constitute a public use).

[8] *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1, 10-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) ("trickle-down" benefits from business development not a public use).

[9] *See also Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) ("[a]lthough the projected economic benefit to County is very attractive, it cannot justify condemnation"); *City v. Owensboro v. McCormick*, 581 S.W.2d 3, 7-8 (Ky. 1979) (same); *Opinion of the Justices*, 131 A.2d 904, 907 (Me. 1957) (same).

private business that might be able to put the land to more "productive" use.[10]

A fundamental flaw of the majority opinion's emphasis on whether a governmental body intended to benefit a private interest or the public is that once the spin-off benefits of large private businesses become per se public uses, there really is no difference between intending to benefit a private party and intending to promote economic development. For instance, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001), *appeal dismissed and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003), the City clearly intended to benefit a private party by condemning a rival discount store and giving the property to Costco. However, the City was motivated by a desire to reap the greater tax dollars Costco would possibly create.

Likewise, in this case, Respondents clearly intended to benefit Pfizer, the "10,000 pound gorilla" in discussions of the development plan, by meeting all of its "requirements" in developing the Fort Trumbull area. Tr. Vol. II, p. 428, lns. 1-3; *see also* footnote 5 of this brief. But the motivation in doing so was to reap the supposed trickle-down benefits Pfizer-related development would bring to the area. When the "public uses" of greater tax revenue and employment are achieved only through the success of private parties, a distinction between an intent to benefit a private party and an intent to benefit the public becomes meaningless. As a result, eminent domain for economic development has no limiting principle.

[10] As the dissenting opinion in this case notes: "The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough." Pet. App. 189 (footnote omitted).

Economic development condemnations also do not have any geographic limitations. Unlike condemnations for blight, which are confined to certain areas that meet statutorily-defined criteria,[11] the eminent domain power for economic development under Chapter 132 applies to all areas throughout the state. Two or more parcels of property can be condemned for a "business purpose," which is defined under Chapter 132 as "any commercial, financial or retail enterprise. . . ." C.G.S. § 8-187(10). Thus, all of downtown Greenwich or New Haven, the suburbs of Hartford, the farms of the northwestern part of the state, or any other area in Connecticut, regardless of its condition, is subject to eminent domain for "commercial, financial or retail enterprise[s]."

By encouraging a vision of eminent domain where virtually any property can be taken for virtually any private business, the majority opinion invites abuse by governmental bodies and private parties. To give but two examples outside of the context of Connecticut, the District of Columbia meets the exact same criteria identified by New London and the majority of the Connecticut Supreme Court as justifying the use of eminent domain. The District needs more tax revenue, and it has high unemployment in comparison to the greater metropolitan area. *Compare* Pet. App. 7. The District is a small city with much of its land devoted to tax-free purposes. *Compare id.* Under the Connecticut court's reasoning, these factors suffice to justify condemnation *anywhere* in D.C. for *any* private business so long as the District government in good faith intends that the new development creates more taxes and jobs than the existing uses.

[11] For example, redevelopment areas in Connecticut must be "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community." C.G.S. § 8-125(b).

While the District could use eminent domain in a blighted neighborhood, as noted, economic development condemnations are not tied to the condition of the area. If developers were more interested in Georgetown than Southwest, the City could condemn there. Georgetown's somewhat upscale shopping could be replaced by truly expensive designer shopping, more like that on Rodeo Drive in Beverly Hills. Georgetown's older townhomes could be replaced by taller condos and office buildings. Would successful businesses and viable homes be uprooted? It doesn't matter. The District intends the new development will produce more taxes and jobs, and that is enough.

Under another scenario, a tax-hungry city could want a Wal-Mart or another big-box retail store rather than a non-tax producing property like a church facility or a Moose lodge. Again, under the reasoning of the Connecticut Supreme Court, so long as there is no evidence that the government specifically intends to benefit *only* private interests through the condemnations, a governmental body would be completely justified in using eminent domain to take tax-exempt property to give to a profit-making entity that could possibly produce more tax dollars and jobs for the City.[12]

Although all property owners would be affected by a ruling affirming the decision below, property owners of

[12] The above examples are not mere hypotheticals. *See Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Ca. 2002) (City of Cypress, CA resolved to file eminent domain proceedings against owners of a piece of vacant land upon which a church sought to build, so that Costco, a major warehouse- style discount retail outlet, which the City hoped would produce more tax revenue, could build there instead); Sue Britt, "Authority votes to force out Moose Lodge," *Belleville News-Democrat*, March 22, 2002, at 3B (government authority authorized condemnation of local Moose Lodge to make way for a Home Depot in Swansea, IL).

more modest means – in particular, middle-class and working-class home and small business owners like Petitioners – would be most at risk.[13] Indeed, the whole idea behind economic development projects is replacing lower-income residents with higher-income ones and smaller, lower-tax stores and services with larger businesses.

> If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.[14]

The use of eminent domain for economic development collapses public use into private takings and must therefore be declared unconstitutional under the Fifth Amendment.

[13] *See* Brief of Amici Curiae NAACP, AARP, et al. at 7-15 (disproportionate effects of economic development eminent domain on minorities and elderly); Brief of Amica Curiae Jane Jacobs at Part I.C. (destruction of poor and politically weak communities).

[14] *Southwestern Illinois Development Authority v. National City Environmental*, 710 N.E.2d 896, 906 (Ill. App. 1999) (Kuehn, J., concurring), *aff'd*, 768 N.E.2d 1 (Ill. 2002).

B. The Use Of Eminent Domain For Economic Development Purposes Is Not Supported By This Court's Eminent Domain Jurisprudence Concerning The Transfer Of Condemned Land To Private Parties.

In addition to conflating public and private use, eminent domain for economic development has no support in this Court's previous statements as to what constitutes a public use under the Fifth Amendment. Eminent domain can unquestionably be used for traditional public uses such as the construction of public buildings and the creation of national parks.[15] Moreover, this Court has noted that the public use clause of the Fifth Amendment does not absolutely prohibit the transfer of condemned land to private parties. But this Court has permitted the use of eminent domain to take private land and subsequently transfer it to other private parties only in specific and limited circumstances. Economic development is neither specific nor limited, and it falls under none of the categories this Court has previously approved.

The eminent domain cases decided by this Court that concerned subsequent transfers of property to private parties are similar to circumstances discussed in the recent decision of *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Hathcock*, the Michigan Supreme Court unanimously overturned its previous holding in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), which had upheld

[15] *See, e.g., Kohl v. United States*, 91 U.S. 367 (1876) (use of eminent domain to build federal courts, custom house, U.S. depository, post-office, and internal revenue and pension offices); *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896) (approving use of eminent domain for creation of Gettysburg Battlefield memorial).

economic development as a public use under the Michigan Constitution.[16] *Poletown* had been the emblematic case cited by courts and commentators alike for permitting the use of eminent domain to take non-blighted areas for private economic development.[17] Petitioners discuss the *Hathcock* case in some detail because it analyzes the exact same issue presented in this case and demonstrates a recent and reasoned explanation of why economic development alone is not a public use.

Hathcock, like *Poletown* and the instant matter, concerned the condemnation of property for the purpose of facilitating private economic development. The County of Wayne condemned 19 non-blighted parcels of property

[16] Even though *Hathcock* is based on interpretation of the "public use" clause of the Michigan Constitution, the language of that state's constitution and the Takings Clause of the U.S. Constitution are virtually identical: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Mich. Const. Art. X, § 2; "nor shall private property be taken for public use without just compensation." U.S. Const., Amend. 5.

[17] Indeed, the Connecticut majority opinion below declared *Poletown* a "landmark decision" and relied upon it in part to hold that economic development constitutes a valid public use for the exercise of eminent domain. Pet. App. 43, 43-45 n.39. *See also, e.g., City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 372 (N.D. 1996) (citing *Poletown* as part of a national trend to "sanction broad legislative discretion to use eminent domain for a variety of economic development purposes"); *City of Duluth v. Minnesota*, 390 N.W.2d 757, 763 n.2 (Minn. 1986) (using *Poletown* as a justification for private-to-private transfers of land "on the ground that the economic benefit that results is 'public' in nature"); *Nichols on Eminent Domain* § 7.07[2][a] (3rd ed. 2004) (describing *Poletown* as an "important precedent" that interpreted public use "quite broadly"); Mark A. Richardson, *The Role of Public Trust Doctrine in Eminent Domain Decisions*, 1995 DET. C.L. REV. 55, 58 ("*Poletown* stands for an extraordinarily broad interpretation of public use/public purpose in condemnation law.").

near an airport as part of a planned 1,300-acre business and technology park. *Hathcock*, 684 N.W.2d at 769. The park was to consist of such uses as a hotel, conference center, and a recreational facility. *Id.* at 769-70. The economic benefits the business park was predicted to generate were very significant, much more than in this case. The park was to raise $350 million in additional tax revenue for the county and create 30,000 new jobs. *Id.* at 770-71. Importantly, the court in *Hathcock* also noted that, like Connecticut's Chapter 132, Michigan law expressly authorized the county to engage in condemnation for economic development purposes and that the condemnations at issue fit within the purposes for which the statute was created. *Id.* at 775-76. But, as here, the question was whether the condemnations satisfied *constitutional* requirements.

Hathcock discarded the notion that a private entity's pursuit of profit could be a "public use" for constitutional purposes simply because that entity's profit maximization might contribute to the overall health of the general economy. In rejecting economic development as a public use, the Michigan Supreme Court surveyed its previous eminent domain jurisprudence and noted that before *Poletown*, its cases upholding the transfer of property from one private party to another fell under three general categories. Economic development did not fall into any of these categories, and it could not be justified by the same rationale. As set forth below, this Court's previous decisions authorizing the transfer of condemned property to private parties also fall into the same categories discussed in *Hathcock*. The use of eminent domain for private development is a radical departure from these conventional categories.

The first category concerns condemnations in which condemned land is constitutionally transferred to a private

entity because "public necessity of the extreme sort" requires collective action. *Hathcock*, 684 N.W.2d at 781-82. The primary example in this category is the construction of "instrumentalities of commerce," such as railroads, gas lines, and canals, all of which require coordination of land assembly. *Id.* at 781. In these cases, the land must be condemned because of the inherent nature of the instrumentalities. They typically require narrow, generally straight pieces of land and could be thwarted by hold-outs. *Id.* at 781-82.

The second category involves the private transferees that remain subject to strict operational controls in carrying out the public use. *Id.* at 782. These cases typically concern the instrumentalities of commerce mentioned above or other closely regulated entities such as water or power companies that might be privately-owned, but are nonetheless performing vital public services. *Id.* In these instances, a public body such as a utility commission must maintain sufficient control of the private company to ensure that the public services are provided. *Id.*

Most of this Court's condemnation decisions have permitted the taking of land and its subsequent transfer to private owners in situations described in these first two *Hathcock* categories. Like the state court decisions mentioned in *Hathcock*, the condemnations in this area most often involved construction of "instrumentalities of commerce," such as railroads, canals, and mine tramways.[18]

[18] *See, e.g., National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (approving condemnation of railroad track for the facilitation of rail service); *Albert Hanson Lumber Co., Ltd. v. U.S.*, 261 U.S. 581 (1923) (upholding condemnation by federal government for a canal and strips of land on the sides of the canal); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916) (property condemnation for purpose of an egress of water to power a hydroelectric dam and whose power would be made

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The uses to which the condemned land was put were also subject to public controls and were designed to address coordination problems that made the assembly of land for various networks or infrastructure often difficult to carry out if eminent domain were not available.[19]

Condemnations for economic development do not fall into either of these categories. As the *Hathcock* court noted, the nation is unquestionably "flecked" with "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." *Hathcock*, 684 N.W.2d at 783. Likewise, the planned uses in Fort Trumbull, such as a hotel, condominiums, private office space, and other unspecified development projects are ubiquitous across Connecticut and throughout the nation. They are most

available to the public); *Hairston v. Danville and Western Railroad Co*, 208 U.S. 598 (1908) (use of eminent domain for construction of railroad spur track that would be open to the public); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527 (1906) (upholding construction of aerial bucket line for mining); *Clark v. Nash*, 198 U.S. 361 (1905) (use of eminent domain to create "absolutely necessary" irrigation ditch for one property owner as part of state-wide effort to provide networks for water distribution in arid Utah environment); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896) (acknowledging eminent domain authority to build railroads but striking down taking of railroad's property to build a private grain elevator); *Boom Co. v. Patterson*, 98 U.S. 403 (1879); *see also* Brief of Amicus Curiae the Reason Foundation at 10-13 (discussing condemnation for railroads, utilities and other common carriers).

[19] The Mill Acts discussed in *Head v. Amoskeag*, 113 U.S. 9 (1885), also fall into these two categories. Mills could only be built and operated in a very limited number of places, and their successful construction required coordination of riparian rights. *See* Brief of the Cato Institute as Amicus Curiae at 13-16; Brief Amicus Curiae of Property Rights Foundation of America, Inc. ("PRFA") at Part I.B. Moreover, the early mills were analogous to public utilities now and subject to common carrier regulations. *Amoskeag*, 113 U.S. at 19 ("[A] grist-mill which grinds for all comers, at tolls fixed by law, is for a public use."); *see also* PRFA Brief at Part I.B.

certainly not "instrumentalities of commerce" requiring government coordination or uses "whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." *Id.* at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). Indeed, there is nothing "public" about them.

Moreover, the private development project in Fort Trumbull is not subject to strict operating limitations so as to ensure that the property continues to be "used for the commonweal after being sold to private entities." *Hathcock*, *id.* at 784; *see also Poletown*, 304 N.W.2d at 479 (Ryan, J., dissenting) (noting such entities as railroads being "subject to a panoply of regulations"). Rather, Respondents here intend for private developers to pursue their own financial welfare like any other private enterprise. Whatever developments eventually go in this area will be controlled and operated by the private parties.[20]

To give but one example, the developer of the office space in Parcel 3 of the Fort Trumbull development plan, not the City or the NLDC, will on its own select the tenants if private offices are eventually built in the area. *See* Pltfs. Exh. HHH at 27, lns. 1-12 ("As a developer, we will seek tenants *and we will make selections of tenants.*") (testimony of Marty Jones, president of developer Corcoran Jennison) (emphasis added). Unlike private entities such as railroads or utilities, the developer in this case will be able to decide who is serviced by the new office buildings and who is not and will be able to set the rents for the

[20] As the court in *Hathcock* noted: "The public benefit arising from the Pinnacle Project [the project at issue in *Hathcock*] is an epiphenomenom of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy." *Id.* at 784.

tenants without being subject to a thorough regulatory regime like common carriers face. Accordingly, the development projects here are completely different than the use of eminent domain for such enterprises as railroads, utilities, and other closely-regulated companies.[21]

The third category discussed in *Hathcock* covers instances where the land transferred to a private party is selected on the basis of "facts of independent public significance." *Hathcock*, *id.* at 782-83. The condemnation of blighted property is the most common example that falls into this last category. In blight condemnations, the property is selected for condemnation for a public reason – the removal of blight – independent of the use to which the condemned property will eventually be put.

The two main public use cases decided by this Court in the past 50 years – *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) – were also based on "facts of independent public significance." *Berman* concerned the question of whether the government could condemn property necessary to clear "slums" and subsequently transfer the cleared or improved property to another private party. A slum was defined as "the existence of conditions injurious to the public health, safety, morals and welfare." *Berman*, 348 U.S. at 31 (internal quotation omitted). Likewise, other blight cases stress that the existence of blight is a harm, the removal of which serves the public and provides a justification for the taking.[22]

[21] The lack of minimum standards and requirements for the use of the property after condemnation in the instant matter is discussed in greater detail in Part II.D.4 of this brief.

[22] *See, e.g., Allydon Realty v. Holyoke*, 23 N.E.2d 665, 668 (Mass. 1939) ("the analogy between a slum and a public nuisance cannot be overlooked . . . The abatement of a public nuisance may well be a public

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Thus, the land at issue in *Berman* was selected to clear slums and remedy urban blight.[23] Once that public use was accomplished and the blight removed, transfer of the cleared land to a private party was acceptable. In the instant matter, Respondents are not operating under Connecticut's urban renewal law nor claiming that the purpose of the condemnations is the removal of blight. The condemnations are therefore decidedly not based upon facts of independent public significance.

Likewise, in *Midkiff*, this Court upheld condemnations based upon Hawaii's oligopolistic pattern of landownership stemming from the state's early monarchical days of feudal land tenure. There, too, the public use was the elimination of the undesirable conditions, not the land's subsequent use. As noted in *Midkiff*, the state and federal governments owned almost 49 percent of Hawaii land while 47 percent of the land was in the hands of a mere 72 private landowners. *Midkiff*, 467 U.S. at 232. The

purpose"); *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 369-70 (Conn. 1954) ("the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums"); *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 482 (Del. 1958) (the "elimination of slums" is "the abatement of a public nuisance" and therefore a public use).

[23] It is important to note the conditions of the area in Southwest Washington, D.C. at issue in *Berman*. This Court cited surveys finding that "64.3% of the dwellings were beyond repair . . . 57.8% of the dwellings had outside toilets . . . 83.8% lacked central heating." *Berman*, 348 U.S. at 30. The district court's decision reveals even more about the conditions of the area. The death rate for the subject area was 50% higher than in the remainder of the District of Columbia. *Schneider v. District of Columbia*, 117 F.Supp. 705, 709 (D.D.C. 1953). Moreover, the death rate from tuberculosis was two and a half times greater and the death rate from syphilis infection was more than six times the general rate in the District of Columbia. *Id.* at 709. Of course, the properties and area at issue in this case display none of those characteristics.

use of eminent domain legislation in *Midkiff* was specifically targeted to address this oligopoly of land ownership. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242.[24] In contrast, there is nothing unique or significant about the land at issue in the instant case. It is simply a middle-class, mixed-use neighborhood that just happened to be at the right place (a desirable location) at the wrong time (when the City and private developers wanted it).

As noted by the dissent below, unlike in blight cases and in *Midkiff*, there is nothing in the *act* of condemning non-blighted properties that constitutes a public purpose. Pet. App. 141-47. Therefore, no public purpose will be accomplished simply by the taking of the existing properties, unlike the public purposes that are immediately fulfilled in the condemnation of blighted areas or the divestiture of oligopolies. *Id.* Rather, in economic development condemnations, the only public benefits that might arise, if they ever come about, are completely reliant upon the private transferees of the properties putting it to private use (and their subsequent ability to make profits in an uncertain and competitive real estate market). The use of eminent domain for economic development is therefore not in keeping with the purposes of the condemnations upheld in *Berman* and *Midkiff*.

In sum, the ordinary benefits that derive from private enterprise cannot constitute a public use under the Fifth Amendment. If all private business development is a "public use," it will be virtually impossible to distinguish between a public use and a private one. That result would violate this Court's repeated admonishments that private

[24] This Court also noted in *Midkiff*, 467 U.S. at 241 n.5, that there was an historical tradition in this country of breaking up "feudal incidents" of land ownership following the American Revolution.

takings are prohibited by the Constitution. The use of eminent domain for private business development also conflicts with this Court's prior jurisprudence that permits the transfer of property from one private owner to another in only limited and specific circumstances. This Court should reject private economic development as a public use.

II. EVEN IF THIS COURT HOLDS THAT EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT IS NOT CATEGORICALLY UNCONSTITUTIONAL, THESE PARTICULAR CONDEMNATIONS STILL DO NOT CONSTITUTE A PUBLIC USE.

Petitioners endorse a clear, bright-line rule that the trickle-down benefits of successful business do not make private business a public use. *See* Part I, *supra*. Nonetheless, if this Court holds that economic development could constitute a public use, it still should find that *these* condemnations do not satisfy the constitutional requirement. Economic development condemnations are not like other uses of eminent domain. Because the public benefits occur, if ever, long after the condemnation and as a result of third-party activities, there must at least be a reasonable certainty that the condemnations will result in those public benefits. The condemnor must actually have a use for the property, and there must be contractual, statutory, or other minimum standards in place to ensure the likelihood of realization of the public benefits that justified the condemnation in the first place. This type of analysis does not require the courts to decide if a particular project is a good idea, but it does allow them to assess the connection between the goals of the project and the means used to achieve them. In this case, the condemnors have no reasonably foreseeable use for the property. That fact alone renders the condemnation of Petitioners' homes not

for "public use." In addition, the condemnations lack minimum standards to ensure realization of public benefit, and the actual use of the property would not result in the purported public benefits.

A. "Public Use" Has Independent Significance In The Text Of The Fifth Amendment.

Constitutional interpretation begins with the text, and this case concerns the meaning of "public use" in the Takings Clause – "Nor shall private property be taken for public use without just compensation." U.S. Const., Amend. V.[25]

This Court presumes that every term in the Constitution has meaning and that nothing is superfluous. *See, e.g., Wright v. United States*, 302 U.S. 583, 588 (1938). As this Court has recognized in another context, the very act of enumeration of a particular power "presupposes something not enumerated." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (*quoting* Federalist No. 45). In the case of eminent domain, government is permitted to take property only for the enumerated purpose of "public use." Using the term "public use" presupposes the existence of something else – a private use; otherwise, "public use" would have no content at all. Accordingly, this Court consistently has held that the Takings Clause prohibits eminent domain for private use. *See e.g.*, footnote 6, *supra*.

To state the obvious, in the Takings Clause, "public use" is contrasted with "private property." Public use therefore meant something other than ordinary private

[25] The "public use" requirement applies to the states through the Fourteenth Amendment. *See Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

property, used in an ordinary private manner. Living on one's property or operating an ordinary business upon it were accepted and commonplace private uses of private property, just as they are now. *See generally*, 1 William Blackstone, *Commentaries on the Laws of England* 134 (Stanley Katz, intro., 1979) (1765) (right to free use and enjoyment of property). *See* Brief Amicus Curiae of the Claremont Institute. They were not, however, public uses. Moreover, the use of the word "public" in other portions of the Constitution confirms that its meaning was either governmental[26] or the public at large.[27] Similarly, other instances of the word "use" confirm that the Framers used it to mean employment or utilization, not incidental benefit.[28]

The judicial interpretation of "public use" has, of course, expanded in the years since the Constitution was ratified, most notably to encompass the removal of slums and blight. *See Berman, supra*. But it is still an independent clause that retains an independent meaning. As the use of eminent domain moves further and further from the text, however, courts should take greater care to ensure that the exceptions are not allowed to swallow the rule.

[26] Art. I., § 9, cl. 7 (expenditures of "public" money); Art. II, § 2, cl. 2 ("public" ministers and consuls); Art. II, § 3, cl. 1 ("public" ministers); Art. III, § 2, cl. 1 & 2 (same); Art. IV, § 1, cl. 1 (recognition given to "public" Acts); Art. VI, cl. 3 (office of "public" trust).

[27] *See* Art. I, § 9, cl. 2a (protection of "public" safety against invasion); Art. V, § 1, cl. 1 (time of war or "public" danger); Art. VI, cl. 1 (right to a speedy and "public" trial).

[28] *See* Art. I, § 8, cl. 12 (appropriation of money to "use" of raising and supporting armies); Art. I, § 10, cl. 2 (money for "use" of the treasury); *see* also *Bailey v. United States*, 516 U.S. 137, 144-46 (1995) ("use" means active employment).

B. Eminent Domain For Economic Development Should Not Receive The Same Deference As More Conventional Uses Of The Power.

The Connecticut court specifically rejected any kind of heightened scrutiny and declined to adopt even *Poletown*'s modest limitations on eminent domain for economic development. *See* Pet. App. 45 n.39, 73 n.62; *compare Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (Mich. 1981) (public benefits in economic development condemnations must be "clear and significant"). Even if this Court finds that economic development as a general matter can be a public use, there is no doubt that economic development condemnation projects are much more "private" than those for privately owned transportation or utilities. Economic development condemnations are intimately tied to private interest, private benefit, and private economic success. Because such condemnations have unique risks, those risks must be countered by a stronger connection between the use of eminent domain and the benefits sought to be achieved. *See also* Brief of Amici Curiae Professor David Callies, et al. at 21-27.

In fact, this Court has in the past suggested the need for more careful scrutiny of condemnations for private ownership than those for public ownership. "[T]he presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to take the land itself." *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668, 680 (1896); *cf.* Pet. App. 137 (dissent) ("as the category of public use changes from one of direct public use to indirect public benefit in the form of private economic development, the level of judicial inquiry must increase in order to protect the legitimate interests of the condemnee").

Indeed, the standard that the Court has actually applied in cases where property has been taken for private ownership has generally been more searching and less deferential in examining the connection to the stated public use and the degree of necessity for the condemnation.[29]

In prior cases of eminent domain for private ownership, at least this Court was certain of the intended use of the property and its connection to the public interest. In contrast, in many economic development condemnations, and in these condemnations in particular, there is far less certainty about the use of the condemned property. With that uncertainty comes a far greater risk that property will be taken for private use or for no use at all.

C. Economic Development Condemnations Carry Greater Constitutional Risk.

All eminent domain actions have the potential to expose condemnees to significant and uncompensable losses. In most condemnations, however, the public benefit

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[29] *See, e.g., Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (taking of natural gas production did not substantially promote stated goal of limiting waste of natural gas); *Brown v. United States*, 263 U.S. 78, 84, 81 (1923) (dam would flood town so "removal of the town is a necessary step in the public improvement itself" and land chosen for relocation was "only practical and available place"); *Clark v. Nash*, 198 U.S. 361 (1905) (taking of drainage easement for private party absolutely necessary); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 166-67 (1896) (individual could not be compelled to participate in irrigation scheme unless benefit to individual was "substantial"); *cf. Union Lime Co. v. Chicago & N.R. Co.*, 233 U.S. 211, 221-22 (1914) (railroad spur would be open to the public and land for spur was "practically indispensable" to operation of lime company); *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 608 (1908) (spur track would be open to the public); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) (tramway carrying ore for all who seek to use it and necessary to transport ore down from mountain).

is both certain and obvious – public works, public utilities, and infrastructure are all acknowledged and unremarkable uses of eminent domain. Condemnations to eliminate slum and blight have the immediate effect of removing an area causing public harm. The public benefit from economic development projects, however, is far less certain. There are at least two major distinctions between economic development condemnations and more traditional uses of eminent domain: first, economic development condemnations often lack "an immediate or reasonably foreseeable public benefit" and second, any public benefit from economic development condemnations flows from the actions of a third party, rather than the condemnor. Pet. App. 142.

1. Eminent domain forces some people to bear a burden that should be, but cannot be, borne by all.

One of the core principles of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Eminent domain, however, imposes unique, sometimes devastating, burdens on condemnees. Some of these burdens simply cannot be "shared" by the act of compensation. The pain of losing one's cherished home, the separation from family members and community, and other intangible but profound personal losses are not and cannot be shared or compensated.[30] Indeed, the personal

[30] *See, e.g.*, Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM L. REV. 1667, 1689-91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community); Frank

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value of property ownership was a vital part of our nation's founding.

A few courts, like New Hampshire, explicitly balance such "social loss" against public benefit. *See Merrill v. City of Manchester*, 499 A.2d 216, 217-19 (N.H. 1985). While this Court has never specifically looked at "social loss" as part of public use analysis, it is interesting to note that very few of the condemnations for private parties considered by this Court have involved the destruction of viable businesses, and none has approved the destruction of viable homes for private ownership.[31]

If Petitioners lose their homes, they will suffer just these types of personal and uncompensable losses. For example, there is no way to "justly" compensate Petitioner Wilhelmina Dery, a woman in her late 80s and in poor health, for being forced out of the only home she has ever known. Forced displacements can have serious health

I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1210-11 (1967) (owners suffer significant demoralization costs when their property is taken by government); *see also Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("Property does not have rights. People have rights."). Brief of Amicus Curiae of Better Government Association, et al. at 9-12, 16-18 (loss of community); Brief of Amici Curiae Mary Bugryn Dudko, et al. at 8-17 (havoc on family and society).

[31] *See, e.g., Clark v. Nash*, 198 U.S. 361 (1905) (noting that condemnation for widened ditch would have no negative effect on condemnee); *Brown v. United States*, 263 U.S. 78 (1923) (land); *Union Lime Co. v. Chicago & N.R. Co.*, 233 U.S. 211, 221-22 (1914) (easement over land); *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 608 (1908) (same); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) (same); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1905) (same). *Berman v. Parker*, 348 U.S. 26, 31 (1954) and *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 150-51 (1906) (one mill rendered another unusable) appear to be two of the few cases to come before this Court that involved the destruction of viable businesses for ultimately private ownership.

consequences for elderly condemnees, and those consequences cannot be shared. *See* Brief of Amicus Curiae NAACP, AARP, et al. at 14-15. Nor is compensation possible for her son, Matt Dery, who will have to move his parents from their home a few steps away and watch them spend the last years of their lives uprooted and unhappy.

In light of these significant and often uncompensable losses it becomes even more important that the condemnation really will yield the benefits that justified the taking in the first place. *See* Pet. App. 163 (citing dissent "tremendous social cost" as important reason for requiring higher level of proof that condemnation will result in its intended benefits). Economic development condemnations have a much greater risk that the benefits that were used to justify the condemnation will never materialize.

2. The public benefits of economic development condemnations are far less certain than the vast majority of other condemnations.

There are at least two significant differences between many economic development condemnations and other, more conventional uses of eminent domain. First, economic development condemnations often lack an "immediate or reasonably foreseeable" achievement of the purposes justifying the condemnation. Pet. App. 141-142. Second, in economic development condemnations, public benefits, if they occur at all, depend on the actions of third parties rather than the condemnor. *Id.* Economic development projects are uncertain ventures that often do not live up to their original promises.[32] But if the benefits of economic

[32] *See, e.g.*, Brief Amici Curiae of the American Farm Bureau, et al., at 16-24; Brief Amicus Curiae of John Norquist at Part I.

prosperity never materialize, condemnees have suffered significant personal losses for no benefit at all. The condemnations at issue in this case vividly demonstrate those risks. There is no immediate or reasonably foreseeable use of any kind for the land where Petitioners' homes now sit. The City will not own the property or participate in any development contracts relating to the property. And the realization of the public benefit of economic development will occur only if private parties are able to generate successful development.

The Connecticut dissent described the majority's public use standard as a "Field of Dreams" – "if you build it, they will come" – approach. Pet. App. 189. Though the dissent's characterization is illuminating, the majority's standard is perhaps better described in this instance as "if you raze it, they will come." There was no planned use for the homes on Parcel 4A, and the chosen developer did not plan to build on Parcel 3 in the reasonably foreseeable future, if ever. According to the majority, however, the Constitution was satisfied if the Respondents believed in good faith in a strategy of clearing the land, hoping a market would develop once it was cleared, and hoping that the subsequent new construction would bring taxes and jobs. Petitioners, however, will lose their homes *now*. Then, much later, they will learn if they lost their homes for public use or for a high-stakes crapshoot on the possibility of a "public use" that never materialized.

Those risks are unusual in eminent domain actions. Conventional condemnations almost always have a reasonably foreseeable use. Although projects to rehabilitate slum or blighted neighborhoods may take time, the elimination of blight occurs almost immediately – with demolition – and such projects are subject to stricter statutory controls than economic development condemnations. *See* Pet. App. 134-190. Thus, in the cases considered by this Court in the past, the public benefits have been almost

immediate and effectuated by the condemnor, not third parties.[33]

D. A Reasonable Certainty Test Counterbalances The Unique Risks Of Economic Development Condemnations.

The condemnation of property for economic development projects should only occur if and when the government can show that there is reasonable certainty that the project will proceed and yield the public benefits that are used to justify the condemnation. This level of certainty would bring economic development condemnations on par with more traditional condemnations, in which the public benefit is both more recognizable and more immediate.

The Connecticut dissent is by no means the first opinion or court to be concerned about the lack of immediate or reasonably foreseeable benefit in condemnations. Nor is it the first to object to a condemnation where the condemnor has no control over the future achievement of the goals of condemnation. There are few federal cases on this issue, but this Court can also look to standards developed in state caselaw. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994) (reviewing different state standards and selecting). There is a substantial body of state caselaw holding that property cannot be condemned when the use is unknown or will occur at an unknown time and that it cannot be condemned if there are insufficient binding standards or assurances that it will be used to achieve the purpose or benefit for which it

[33] *See, e.g.*, *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (act of transfer immediately achieves goal of greater diversity of ownership); *Berman v. Parker*, 348 U.S. 26 (1954) (removal of area of slum, high crime, disease, and infant mortality); *United States v. Carmack*, 329 U.S. 230 (1948) (post office).

is being condemned. These cases form a rough consensus that is an appropriate test for economic development condemnations in particular: There must be a planned, reasonably foreseeable use and sufficient contractual, statutory, or other minimum standards in place to make the realization of the promised economic benefits from the condemnation reasonably certain. While Petitioners do not think it is a necessary part of a reasonable certainty test, the Connecticut dissent also suggests a useful and slightly different analysis of whether the actual planned uses of the property will result in the purported public benefits.

A reasonable certainty test counters the unique risks of condemnation for economic development. If the benefits are not immediate, at least the use should be reasonably foreseeable. If the public benefit will arise from the actions of third parties, at least there are binding contractual or statutory standards to ensure the realization of the goals of the condemnation. A reasonable certainty test does not require courts to decide if a particular project is a good idea. Instead, it asks courts to look at plans and timelines to see if there is a reasonably foreseeable use of the property and to look at standards and restrictions in contracts, statutes, and other documents to see if they assure a substantial likelihood of the purported public benefits. While absolute certainty will never be possible, reasonable certainty at least ensures that there is a strong likelihood that the prognosticated public benefits will actually occur. Without that reasonable certainty, people's homes and businesses can and will be taken with no public use and no public benefit.

1. In economic development condemnations, a public use should be a known use.

The Constitution requires that property be taken only for public use. If the use is unknown, it is impossible to evaluate if it is being condemned for public use or not. It is therefore not surprising that courts have expressed grave discomfort with takings that lack a stated use or where there is no immediate or reasonably foreseeable use for the property.

In *Cincinnati v. Vester*, 281 U.S. 439, 448 (1930), this Court refused to uphold a condemnation without knowing what the City would actually do with the property. The Court construed an excess condemnation statute to require a statement of the purpose of the condemnation, because construing the statute to permit condemnation for an "independent and undisclosed public use" would raise constitutional problems. *Id.* at 448. The original project was for the widening of a street, but the City sought to condemn additional property, possibly to recoup the costs of street construction, possibly to promote "harmonious development" along the street. This Court explained that the use could not be "to be determined only by such future action as the City may hereafter decide upon" and that "[i]t is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation." *Id.*; *see also Brown v. United States*, 263 U.S. 78, 83-84 (1923) (upholding condemnation and explaining that land was being condemned for actual use of relocating town and not for "speculation").

State courts also have expressed concern about "speculative" condemnations, often treating the issue as a problem of lack of necessity, in a temporal sense, or a

hybrid of public use and necessity.[34] In other words, if there is no immediate or reasonably foreseeable need for the property, the condemnation is premature. Notably, the state cases requiring an immediate or reasonably foreseeable use for condemned property almost all address takings for conventional, uncontroversial public uses. Here, where the property is being taken for unspecified economic development uses, the potential for abuse and the need for reasonable foreseeability are much greater.

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[34] *See, e.g.*, *City of Phoenix v. McCullough*, 536 P.2d 230, 232-37 (Ariz. App. 1975) ("if the condemning body is uncertain when future use shall occur, the future use becomes unreasonable, speculative, and remote as a matter of law and defeats the taking"); *San Diego Gas & Electric Co. v. Lux Land Co.*, 14 Cal. Rptr. 899, 904 (Cal. App. 4 Dist. 1961) (taking of easement for telephone, gas, and electrical use is speculative where utility has no present intention to install transmission lines); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002) (condemnation premature when no reasonable likelihood project will proceed); *State v. 0.62033 Acres of Land*, 112 A.2d 857, 860 (Del. 1975) (taking of land for highway without plan and that may be needed "some time in the future" not sufficiently in the reasonably foreseeable future to necessitate taking); *Meyer v. Northern Indiana Public Service Co.*, 258 N.E.2d 57, 58-59 (Ind. 1970) (taking of right of way for "sometime in the future, maybe as much as six or ten years," considered a "purely speculative future need."), *superceded on unrelated grounds*, 287 N.E.2d 882 (Ind. 1972); *People ex Rel. Director of Finance v. YWCA*, 427 N.E.2d 70 (Ill. 1981) (finding condemnation unnecessary where contracts for construction and use of building not in place); *Regents of Univ. of Minnesota v. Chicago and North Western Transp. Co.*, 552 N.W.2d 578 (Minn. App. 1996) (where there were three potential uses for land but they were mutually exclusive and none had been approved and soil contamination precluded current development, taking not necessary); *City of Helena v. DeWolf*, 508 P.2d 122, 128 (Mont. 1973) (where parking would be needed only if other parts of the project succeeded, government could not seek property now "to await money, motivation, and the hopes of the planners"); *see also Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc.*, 543 S.E.2d 844, 847-48 (N.C. 2001) (construing statute to avoid constitutional problem and holding that condemnor could not take property in excess of that needed for stated public use).

This Court's decision in *Cincinnati v. Vester*, as well as the various state court cases, suggest a workable standard: When property is being condemned for economic development, there must be a planned use for the property that will be implemented in the immediate or reasonably foreseeable future.

2. The condemnations of Petitioners' homes lack immediate or reasonably foreseeable uses.

In this case, Respondents seek to take Petitioners' homes for (1) an office building that the developer has no plans to build and (2) some other, unknown use. Not only is there no reasonable certainty of public benefit, there is reasonable certainty that those benefits will *not* occur. These condemnations blatantly violate the principle that property should not be taken without a reasonably foreseeable use, and the Court can reject them solely on that narrow basis.

The homes lie in two nearby areas of the development plan. Four of the homes, those in "Parcel 3," are being taken for an office building that the developer admits that it does not plan to build in the foreseeable future, if ever. J.A. 47 (office development "uncertain"); J.A. 64 ("not feasible at this time"). Indeed, the developer's study described the construction of the building as "speculative." J.A. 64. If and when the developer began the project, it planned to develop other offices first and did not plan on constructing office space on Parcel 3 in the foreseeable future. J.A. 64 (existing office building will be developed first; other office space "not feasible"). The developer planned to build the office building that would occupy the land of the former homes dead last, if it built it at all. J.A. 33-34; 46-48, 73 (development descriptions and timeline).

The developer would not put in office space on Parcel 3 without known tenants. There were, however, no contracts with future tenants and indeed little interest from potential tenants of any office space. Pet. App. 180-81 (dissent); *see also* Pet. App. 330 (trial court opinion).

The other eleven homes are in an area known as "Parcel 4A," which is labeled "Park Support" in the development plan and appears as a blank space on the current site plan. *See* Pet. App. 6; J.A. 5. No witness knew what "Park Support" meant and all witnesses admitted it could be a wide range of possible uses. *See* Pet. App. 125 (majority opinion); 348 (trial court opinion); *see also* footnote 4, *supra*. Thus, at the time of the condemnation, there was no identified use for the area and certainly no "immediate" or "reasonably foreseeable" use of any kind.

The Connecticut Supreme Court was unfazed by the speculativeness of these condemnations. Regarding Parcel 3, it thought that a 1999 study stating that there was a "potential" demand by 2010 for an additional 8,400 to 245,100 square feet of office space somewhere in the Fort Trumbull area made the use foreseeable enough. To translate, a 1999 study said that there was "potential" demand in 11 years for as much as one additional office building or as little as one medium-sized office. By 2001, and before the condemnations took place, the chosen developer had concluded that construction of offices on Parcel 3 – the specific location of four of Petitioners' homes – would be "speculative," that the developer would try to develop other office space not on Parcel 3, and that it would reconsider Parcel 3 only if the market changed sometime in the future. Pet. App. 102-103; J.A. 47, 64. The majority's additional reasoning is even more disturbing. The majority took comfort in the fact that once Pfizer opened, more demand for office space might develop. "[A]t

the time of trial, the Pfizer facility had just opened; it therefore did not have the opportunity to create demand." Pet. App. 107-08. In other words, there was no reasonable foreseeable use for the property when Respondents condemned it, but perhaps some use might develop *after* the condemnations were complete. This analysis is exactly backwards and makes the condemnations, at best, premature. Petitioners' response is simple: There must be a reasonably foreseeable use for the property at the time that condemnation is sought, not a hope that a use will become reasonably forseeable at some unknown point in the future.

Regarding Parcel 4A, the majority pointed out that although no witness could define Park Support, the witnesses were able to name some possible uses that "Park Support" could include. Pet. App. 346. Indeed, the witnesses were able to hypothesize some possible, mutually incompatible uses for Parcel 4A. Perhaps Respondents would settle on one of these or come up with something else to do with the property once it was condemned, and perhaps not. But saying that property could perhaps be used as parking, retail, a museum, warehouses, storage, or something else does nothing to establish that any particular use of the property is reasonably foreseeable. Indeed, the complete lack of any planned use for the 11 homes on Parcel 4A was what led the trial court to hold that those takings were improper. According to the trial court, it was impossible to say that a use was public without knowing what the use would be, and it was similarly impossible to find that the condemnation of the property was necessary for the unknown use. Pet. App. 348-350. These condemnations are utterly speculative and for this reason alone, they must be declared unconstitutional.

3. Economic development condemnations should require minimum standards and controls over future use and benefit.

Courts also have been uncomfortable with condemnations transferring property to private parties without significant assurances of future use or benefit. This Court does not appear to have considered a case such as this one, where the future use of condemned property was unknown and would be determined by third parties. Most of the condemnations considered by this Court were for very specific purposes. *See, e.g.*, footnotes 15, 18, 29, *supra*.

Examination of constraints upon future use of condemned property is not unusual. This examination typically takes the form of examining the development agreement to see if there are contractual obligations ensuring that the intended public benefits actually occur, rather than vague and general promises.[35] The Connecticut dissent also notes

[35] *See, e.g.*, *United States v. Agee*, 322 F.2d 139, 143 (6th Cir. 1963) (condemnation had sufficient assurances because title to property retained by Tennessee Valley Authority and lease with Girl Scouts permitted termination at will of TVA and flooding by the TVA); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (In Bank) (holding that agreement lacked controls over the use of the property and "[s]uch controls are designed to assure that use of the property condemned will be in the public interest"); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served"); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 108-11 (N.J. Super. Ct. 1998) (noting importance of having "restrictions in the agreement between the public agency and the private developer" and finding contract lacked sufficient binding obligations); *City of Virginia Beach v. Christopoulos Family*, 54 Va. Cir. 95, 108 (Va. Cir. 2000) (contract gave developer complete control over future use of property); *see also Condemnation of 110 Washington Street*, 767 A.2d 1154, 1160 (Pa. Commw. 2001), *app. denied*, 767 A.2d 379 (2001) (contract gave private party authority to decide whether or not to condemn each piece of property); *cf. Hathcock*, 684 N.W.2d at 784

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many types of minimum standards or requirements that could be relevant in evaluating reasonable certainty (Pet. App. 183, 188 n.28) and notes that statutory constraints would also be important to ensure the realization of the purported public benefits especially when a public body is not carrying out the project. Pet. App. 143-45.

Again, the state caselaw suggests a workable judicial approach: There must be binding contractual, statutory, or other minimum standards or requirements in place that ensure the private party uses the property in the manner approved by the condemnor and that make the realization of the tax revenue and job benefits reasonably certain.

4. These condemnations lack binding contractual or statutory minimum standards to make realization of the public benefit reasonably certain.

Although the lack of a reasonably foreseeable use for the property alone renders these condemnations unconstitutional, they also lack minimum standards and mechanisms for ensuring the public benefits that were used to justify the takings in the first place. At the time of the condemnation, there was no development agreement for Parcel 3, although negotiations with the developer indicated it would receive the property on a lease for $1 per year for 99 years.[36] Pet. App. 177-79. As there was no contract, there also was no contractual timeline or other requirement to ensure the development of Petitioners' land

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(noting importance of existing "mechanisms" that "ensure" future public use).

[36] There will be no financial benefit to the City from the lease, and the dissent notes that since the terms of the contract (other than the $1 lease price) were unknown, it is possible that tax revenues would not increase even if the businesses did succeed. Pet. App. 182-184.

or any public benefits that are supposed to flow from that development. Pet. App. 183-84. For the homes in Parcel 4A, there was no planned use at all and thus no means of ensuring the planned use would lead to economic development.

There are no statutory assurances or requirements for the course of an economic development plan. Pet. App. 174 n.21. In fact, the statutes allow the abandonment of the plan after a minimum of three years. Pet. App. 142. If it is not abandoned, the plan, under its own terms, will stay in effect for as long as 30 years. During those three to 30 years, the achievement of tax or job growth – the public use for which Petitioners may lose their homes – is completely out of the City's hands. The achievement of economic growth, should it occur, will be wholly contingent on the economic success of private businesses. If they do well, the City may see the "trickle-down" benefits of additional tax revenue and jobs. *See SWIDA*, 768 N.E.2d at 10-11. If they do not, Petitioners' homes will be long gone.

The Connecticut majority pointed to two factors in ruling against Petitioners: first, that the development plan stated that future contracts with developers should include a commitment that property would be developed pursuant to the development plan and that a state agency would have some continuing involvement in the development. Pet. App. 74-76. The difficulty, however, is that none of that creates any assurance that Petitioners' land will be developed at all, much less that it will produce economic development. As the dissent explained, "[s]uch minimum standards might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value." Pet.

App. 188 n.28. Instead, there is "no development agreement, no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives . . . , and no indication of possible penalties if developers do not perform as required." Pet. App. 183. Accordingly, there are insufficient contractual or statutory minimum standards to ensure a reasonable certainty of public benefit.

The lack of such standards leads to yet a further danger – that of undue private benefit or purpose. When all of the crucial determinations that will give rise to public benefit or private advantage can be made *after* the condemnations take place, then the possibilities for abuse multiply exponentially. Many condemnation projects have significant benefits for private parties. A rule allowing condemnation in advance positively encourages speculation, because the easiest way to withstand a public use challenge will be to say that there is insufficient evidence (yet) of undue private benefit. Once the condemnation has taken place, the condemnee will have no legal recourse. Minimum standards are essential to ensure that such abuses do not occur.

5. The Kelo dissent's test of examining if the actual use of the property will produce public benefit could also be a factor in determining public use in economic development condemnations.

The dissent also used a reasonable certainty standard but had an additional and slightly different focus, asking whether the actual, currently planned use of the property was reasonably certain to bring the prophesied economic

development.[37] In other words, the dissent asked if, at the time of the taking, there was a reasonable certainty that if the stated improvements were constructed as planned, they would indeed promote economic development. This approach is one that also has been suggested by this Court and used by some other courts. *See, e.g., Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 78 (1937) (finding actual "necessary operation and effect" of natural gas regulation to transfer benefits from one person to another); *Brown v. United States*, 263 U.S. 78, 83-84 (1923) (explaining that land was being condemned for actual use of relocating town and not for speculative purposes).[38] Petitioners believe this could be another factor for courts to look at in evaluating economic development condemnations. The condemnations of Petitioners' homes would fail such a standard. As explained by the dissent, an office building with no market and an area for which there are

[37] The dissent below proposed a four-step test in which the court evaluates: (1) whether the statutory scheme is facially constitutional; (2) whether "the primary intent of the particular economic development plan is to benefit . . . public [] interests;" (3) whether "the specific economic development contemplated by the plan will, in fact, result in public benefit;" and (4) whether the condemnation is reasonably necessary to implement the plan. Pet. App. 159-70. The third step is the one that differs significantly from the majority opinion, and thus it is the one Petitioners discuss in this brief.

[38] *See also Patel v. Southern California Water Co.*, 119 Cal. Rptr. 2d 119 (Cal. App. 2002) (land condemned by water company would actually be used for cell phone tower); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 857 (S.C. 2003) (noting that actual use would be "gated facility with no general right of public access"). Many of the cases examining whether the public use is "primary" or "incidental" also look to the actual use in making that determination. *See, e.g., Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 456-58 (Fla. 1975) (examining planned use to determine if private benefits were primary or incidental and discussing other cases also looking at actual use); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (examining planned actual use of property to determine primary benefit).

no plans do not have a reasonable certainty of producing economic development. Pet. App. 177-86. This test responds to the majority's holding that a mere *claim* that a project will lead to economic development constitutes a sufficient connection between the condemnation and economic development. The dissent suggested, in effect, that "public use" means more than a wish list of benefits that the City hopes, after condemnation, someone else will bring about. Petitioners believe, however, that these condemnations may be rejected by looking at whether the use is reasonably foreseeable and binding minimum standards for ensuring public benefit are in place, without needing to project the actual use and whether public benefits would result from that use.

III. THE SKY WILL NOT FALL IF THIS COURT RULES IN FAVOR OF PETITIONERS, WHILE A RULING AFFIRMING THE CONNECTICUT SUPREME COURT WILL OPEN THE FLOODGATES.

It is important to note the limited nature of Petitioners' challenge. Petitioners challenge the condemnation of their homes for economic development alone. They do not challenge other government methods of trying to promote economic development. They do not challenge condemnations to eliminate blighted and harmful conditions. Connecticut and the five other states that have ruled that government may condemn for economic development all have urban renewal statutes that will remain in place.

A ruling in favor of Petitioners would not even prevent Respondents from pursuing this particular development project. Petitioners' homes comprise a miniscule portion of the land in the Fort Trumbull development plan and are situated only on Parcels 3 and 4A. Tr. Vol. II, p. 14, lns. 21-24, p. 37, lns 10-12; J.A. 3 (map showing Petitioners'

homes); J.A. 4 (map showing development parcels in the development plan). Respondents will be able to develop the hotel (Parcel 1), upscale condominiums (Parcel 2), and currently planned office space (on Parcel 2) and other unplanned uses on Parcels 4B, 5, 6, and 7, if they so choose. J.A. 4.

In contrast, a ruling upholding the decision below will indicate to lower courts throughout the country that have not ruled on this issue that there is no bar under the U.S. Constitution against the use of eminent domain to raise more tax revenue or to improve the local economy, thus placing at risk all home and small business owners outside of the limited number of states that prohibit these takings. Henceforth, private business development will itself be a public use, and property may be forcibly acquired for private business, as long as the government claims that the project will lead to an increase in tax revenues or jobs. Such a claim will not be difficult to make. Every city desires more tax dollars, and a more "productive" use can be imagined for almost every property in the country. Only an utterly unimaginative and incompetent condemnor could fail to come up with a justification, and the public use requirement will be reduced to the question of whether the government body has a "stupid staff." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

CONCLUSION

If the "public use" requirement means anything, it means that the government may not take A's home and give it to B, because B is likely to employ more people and produce more tax revenue. Condemnation for economic development goes far beyond anything this Court has previously considered. Such a radical leap is unwarranted, and unsupported by our Constitution or caselaw.

Petitioners respectfully ask this Court to reverse the decision of the Connecticut Supreme Court.

Respectfully submitted,

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